ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

To: The Commission

COMMENTS OF BELLSOUTH (PHASE I)

John F. Beasley
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309-2641
(404) 249-4445

Charles P. Featherstun
David G. Richards
1133 21st Street, NW
Washington, DC 20036
(202) 463-4132

Its Attorneys

April 19, 1996

SUMMARY

The Commission has proposed in this proceeding a variety of steps which are essential toward achieving a more competitive, less collusion-prone market for the provision of domestic interexchange services. BellSouth supports the use of certifications instead of tariff filings to ensure compliance with the geographic rate averaging and rate integration requirements of the 1996 Act. Certifications will reduce regulatory impediments to a fully competitive market and will make the opportunities for collusive behavior among interexchange carriers somewhat more difficult. When warranted by competitive circumstances, BellSouth urges the Commission to forbear from enforcing these requirements.

In addition, BellSouth believes that an appropriate relevant product and geographic market definition is essential to foster the development of a competitive market. In recent years, the Commission has defined the relevant market as all domestic, interstate, interexchange services nationwide, with no relevant submarkets. BellSouth urges the Commission to retain this broad definition of the relevant market. The existence of market power over certain discrete fringe services does not warrant redefinition of the relevant product market, nor does the BOCs' classification as dominant in the local exchange market provide a basis for revising the relevant geographic market definition. In the absence of substantial cause, there is no basis for adopting a new classification.

Commission concerns that BOC LECs will exercise market power by providing poorer or delayed access to its interexchange rivals than it provides to itself or an affiliate are unfounded. The Commission's access charge rules obligate LECs to provide equal access and thus serve to prevent such discrimination by a BOC. BOCs also have no incentive to jeopardize the revenues they obtain from access charges by providing inferior access, or denying it altogether.

Finally, elimination of artificial structural constraints on LECs, and the BOCs in particular, concerning their entry into full interexchange competition will reduce unnecessary regulatory impediments to full competition. There should be no structural separation requirement imposed upon a LEC in order for a LEC to provide interexchange service on a nondominant basis. BellSouth thus supports lifting the existing structural separation rules applicable to independent LECs, and urges the Commission to short-circuit its proposed adoption of such rules for BOCs in the *BOC Out-of-Region* proceeding by not adopting such rules even for an interim period. Moreover, any structural separation rules that are applied to the BOCs in that docket should be eliminated immediately upon completion of this rulemaking.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

To: The Commission

COMMENTS OF BELLSOUTH (PHASE I)

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits these comments in response to Sections IV, V, and VI of the Commission's *Notice of Proposed Rule Making*, CC Docket No. 96-61, FCC 96-123 (released Mar. 25, 1996), *summarized*, 61 Fed. Reg. 14,717 (1996) ("*NPRM*"). In these sections, the Commission has asked for comment on the implementation of the geographic rate averaging and rate integration provisions of the Telecommunications Act of 1996 (the "1996 Act"),[1] determining the relevant product and geographic market definitions for interstate, interexchange carriers, and modifying or eliminating the separation requirements for independent local exchange carriers ("LECs") and Bell Operating Companies ("BOCs").

In this proceeding, the Commission takes a variety of essential steps toward a more competitive, less collusion-prone market for the provision of domestic interexchange services. The use of certifications instead of tariff filings to ensure compliance with the geographic rate averaging and rate integration requirements of the 1996 Act, like the detariffing of interexchange services that

---

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

will be addressed in the Phase II comments, will reduce regulatory impediments to a fully competitive market and will make the opportunities for collusive behavior among interexchange carriers ("IXCs") somewhat more difficult. Establishment of an appropriate relevant product and geographic market definition is also essential for fostering the development of a competitive market. Likewise, elimination of artificial structural constraints on LECs, and the BOCs in particular, concerning their entry into full interexchange competition will reduce unnecessary regulatory impediments to full competition

I. GEOGRAPHIC RATE AVERAGING AND INTEGRATION

New Section 254(g) of the Communications Act requires the Commission to adopt rules to require rate averaging and rate integration.[2] Rate averaging would require that "the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider in urban areas," while rate integration would require that "a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to subscribers in any other State "[3]

The Commission proposed to require carriers to file certifications that they are in compliance with these requirements and to rely on the Section 208 complaint process, rather than a tariff filing requirement, for enforcement of the rate averaging and integration requirements.[4] The Commission also sought comment on whether it should forbear from enforcing the rate averaging requirement under particular circumstances.[5] BellSouth agrees with the Commission's proposal to rely on certifications to ensure compliance with the rate averaging and integration requirements and urges the Commission to forbear from enforcing these requirements when warranted by competitive circumstances.

---

2 47 U.S.C. § 254(g).

3 *Id.*

4 *NPRM* at ¶¶ 70, 78.

5 *NPRM* at ¶ 69.

A. Carrier Certifications, Rather Than Tariff Filings, Should Be Used to Ensure Compliance With Geographic Rate Averaging and Integration Requirements

BellSouth strongly supports the Commission's conclusion that a tariff filing procedure would be inappropriate for ensuring rate averaging and integration. While tariff filings might marginally aid in detecting some violations, they would not *ensure* that carriers comply with the rate averaging and integration requirements. Ultimately, questions of compliance would have to be resolved in complaint proceedings even under a tariff filing scheme, because violations would not necessarily be apparent on the face of the tariffs. Rate averaging issues in particular would have to be resolved on a case-by-case basis because of the unique characteristics of any geographic comparison.[6]

Moreover, tariff filings—even for this limited purpose—would slow competitive responses, impose unnecessary costs on firms that eventually get passed on to consumers, and facilitate parallel or collusive pricing among competitors. Tariff filings could be used by established interexchange carriers to signal the way in which they price services geographically, thereby enabling cartel-like behavior.[7] This would diminish competition and ultimately lead to higher prices for consumers of

---

[6] In any such case, a particularized determination would have to be made as to the geographic scope of the averaging requirement—*i.e.*, which rural and high-cost areas are to be considered with which urban areas. The Commission wisely has not proposed specific rules for making such determinations. *See NPRM* at ¶ 71. Given that any such determination will be fact-bound and must take into account local and regional concerns, BellSouth submits that the Commission should not adopt any specific rules or procedures for ensuring compliance. This is particularly true because, as the Commission and Congress recognized, geographical averaging with respect to intrastate service issues will continue to be determined at the State level. *See id.* at ¶ 68 n.153 (*quoting* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 129 (1996) ("Conference Report")). The Commission should not adopt rules that would preempt the ability of State commissions take into account a wide variety of factors in making such determinations.

[7] For example, incumbent carriers could determine from a new competitor's tariff filing that the competitor is averaging in a different way or over a different geographic region from the established carriers and respond with their own tariff filings designed to send a signal to the competitor that it deviates from the established carriers' practice at substantial risk. In this way, even non-price tariffs could constitute an effective cartel-like mechanism.

telecommunications services in both urban and rural/high-cost areas. While a certification requirement, as opposed to tariffs, would lessen the opportunities for tacit collusion and cartel-like behavior among existing carriers, detariffing is not sufficient to ensure competitive conditions. True interexchange competition can only be achieved through the elimination of barriers to entry by new competitors.

B. The Commission Should Forbear From Enforcing Geographic Rate Averaging and Integration Requirements When Warranted by Competitive Circumstances

The Commission has sought comment on (1) whether it should forbear from enforcing the geographic rate averaging requirement under particular competitive conditions or other circumstances, and (2) whether optional discount or promotional plans should have to be offered uniformly throughout a carrier's service area.[8] BellSouth submits that the Commission should forbear from enforcing both the rate averaging and rate integration requirements with respect to offerings made in response to competitive conditions in particular geographic areas.[9]

Carriers providing service throughout a broad region or nationwide will be in competition with carriers providing more geographically limited service. For example, some carriers may provide service only to customers in particular urban and suburban areas where costs are low. Obliging carriers with broader coverage to charge the same rates in these urban/suburban areas that they charge in rural and high-cost areas will give the geographically-limited carriers a price advantage that will facilitate potentially inefficient "cream skimming," because averaging rules would prohibit a legitimate competitive response—leveraging prices to meet competition and benefit

---

[8] *NPRM* at ¶¶ 69, 72.

[9] Similarly, if existing carriers do not make discount or promotional plans available to subscribers in rural and high-cost areas, the Commission should forbear from requiring new competitors to make such plans available in rural and high-cost areas.

consumers. This could lead some carriers to cut back on their service offerings in rural and high-cost areas, or deter new entry into such areas. In a competitive marketplace, carriers should have the ability to make competitive responses to the particular competitive characteristics of different areas.[10] Similarly, an interexchange carrier should be permitted to respond to market demand by offering optional discounts or promotional plans in particular geographic areas, since the legislative mandate of the 1996 Act will be satisfied through geographic averaging of its non-discounted rates.

The Robinson-Patman Act[11] provides an example of the importance of allowing firms to lower prices to meet competition, and the consumer benefits that flow from lower prices. The Robinson-Patman Act prohibits discrimination in the sale of goods. However, Section 2(b) of Robinson-Patman contains a meeting competition provision that creates an absolute defense to a charge of illegal price discrimination. The defense allows a firm to lower prices to one customer if it has a good faith belief that the lower price is needed to meet a competing offer. The Supreme Court has stated that the meeting competition defense is "the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers."[12] The Commission's enforcement of the rate averaging and rate integration provisions in competitive markets without a "meeting competition" provision is likely to distort competition and prevent consumers from benefitting from discounting.

Forbearance from geographic rate averaging and integrating is clearly required by new Section 10(a) of the Communications Act when circumstances warrant. Under Section 10(a), the

---

[10] In any proceeding on a complaint for enforcement of the rate averaging or integration requirement, the Commission should place the burden on the complainant to demonstrate that competitive circumstances do not warrant forbearance.

[11] 15 U.S.C. § 13-13b, 21a.

[12] *See Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82 n.16 (1979).

Commission is obliged to forbear from applying "any provision of this Act" to a carrier "in any or some of its . . . geographic markets" when specified criteria are met. Thus, Congress specifically intended that the provisions of the 1996 Act should not be always applied uniformly to all geographic areas.

The statutory criteria for forbearance are: (1) enforcement is not necessary to ensure that rates and practices are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for consumer protection; and (3) forbearance will serve the public interest, including promotion of competitive market conditions.[13]

These criteria are satisfied here. First, the Commission has long held that in a competitive marketplace, rate differentials may be justified in response to competitive conditions.[14] Accordingly, deviations from geographic rate averaging and integration in response to competitive conditions should not be considered unjust or unreasonable, or unjustly or unreasonably discriminatory, in the absence of a factual record demonstrating that the deviation is not warranted by competitive conditions. Second, enforcement of the geographic rate averaging and integration requirement is not necessary for protection of consumers when a deviation is made in response to competitive conditions, because under these circumstances enforcing the requirement would lessen competition, to the detriment of consumers. Finally, forbearance under these circumstances will serve the public

---

[13] 47 U.S.C. § 160(a)(1)-(3), (b).

[14] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, CC Docket No. 79-252, *Fourth Report and Order*, 95 F.C.C.2d 554, 582 (1983) (*Fourth Report and Order*), *vacated AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); *Fourth Further Notice of Proposed Rulemaking*, 96 F.C.C.2d 1191 (1984); *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984) (*Fifth Report and Order*); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985) (*Sixth Report and Order*), *vacated MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively the *Competitive Carrier Proceeding*); *see Telpak Rates*, 38 F.C.C. 370 (1964), *aff'd sub nom. American Trucking Associations v. FCC*, 377 F.2d 121, 131 (D.C. Cir. 1968), *cert. denied*, 368 U.S. 943 (1967).

interest because it will permit carriers to respond quickly to competitive conditions in particular geographic areas with specific service offerings targeted to other carriers' area-specific offerings. Moreover, forbearance will also serve the public interest by encouraging the entry of new competitors into rural and high-cost markets that they might otherwise avoid, because under a strict averaging obligation such entry would diminish their ability to compete effectively in urban markets.

II. THE COMMISSION SHOULD RETAIN ITS EXISTING DEFINITION OF THE RELEVANT MARKET AS ALL DOMESTIC INTERSTATE INTER-EXCHANGE SERVICES NATIONWIDE, WITH NO RELEVANT SUB-MARKETS

In the *NPRM*, the Commission has proposed to reexamine its definition of the relevant product and geographic markets for purposes of assessing the market power of interexchange carriers.[15] As discussed below, the Commission has decided the relevant market at least three times in recent years, and on each occasion it has concluded that there is a single nationwide market for all domestic interstate interexchange service. This market definition has, on each occasion, advanced the interests of AT&T, the nation's largest IXC, over the objections of BOCs. It underlies the Commission's competitive carrier policies, the reclassification of AT&T as a nondominant carrier, and the approval of AT&T's acquisition of McCaw. The Commission cannot now suddenly switch course and adopt an entirely new market definition without substantial cause,[16] and any change would require revisiting the competitive effects of the policy decisions that were based on the existing market definition.

Selection of the proper product and geographic market definitions is an important first step in any analysis of competitive conditions. Given the parallel pricing behavior of the big three IXCs in the past and the failure of antitrust authorities to take any action to deter such tacit collusion, it is essential that the Commission employ a market definition that will lead to the proper evaluation of competition in the interexchange market. The 1996 Act gives the Commission the opportunity

---

[15] *NPRM* at ¶ 40.

[16] Although an agency's view of what is in the public interest may change, the agency "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *accord Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) ("[A]brupt shifts in policy do constitute 'danger signals' that the Commission may be acting inconsistently with its mandate.").

to eliminate government-imposed restrictions on the entry of new, effective competitors. The Commission should ensure that its market definition facilitates analysis of the lack of real competition in interexchange services, rather than placing undue emphasis on the alleged regional advantages of potential new entrants such as the BOCs.

BellSouth urges the Commission to retain its current broad definition of the relevant market. Currently, the Commission defines the relevant product market as all interstate, domestic, interexchange telecommunications services, with no relevant submarkets.[17] The relevant geographic market is defined to comprise the United States and its territories.[18] The Commission just last year readopted these definitions of the relevant geographic and product market, after exhaustive analysis, in the *AT&T Non-Dominance Order*,[19] which reclassified AT&T as a non-dominant carrier.[20] There, the Commission noted that these definitions have been used in classifying all of AT&T's competitors as non-dominant carriers, and concluded "We see no basis for determining whether AT&T is non-dominant under a different standard than that used for classifying its competitors."[21] Similarly, the Commission relied on the existence of a single nationwide market for interstate interexchange services as the basis for its determination in the AT&T-McCaw merger case that there

---

17 *Competitive Carrier Proceeding, Fourth Report and Order*, 95 F.C.C.2d at 563-64, 574-75.

18 *Id.* at 563.

19 *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 1 Com. Reg. (P & F) 63 (1995) (*AT&T Non-Dominance Order*).

20 A dominant carrier is defined as "a carrier that possesses market power," and a non-dominant carrier is one that "does not possess market power." *Id.* at 71. Traditionally, dominant carriers, which included AT&T until late 1995, have been subject to more stringent regulatory constraints than non-dominant carriers, including price cap regulation for non-streamlined services and more specific and time-consuming Section 214 and tariff requirements. By contrast, non-dominant carriers are not subject to price cap regulation and can file tariffs for domestic services on one day's notice. *Id.* at 68-69.

21 *Id.* at 72.

was no separate market or submarket for cellular-originated interexchange services in McCaw's cellular markets.[22]

The Commission is now considering whether to adopt more narrowly drawn market definitions. Specifically, the Commission seeks comment on whether to define the relevant product market as "an interstate, interexchange service for which there are no close substitutes or group of services that are close substitutes for each other but for which there are no other close substitutes."[23] Similarly, the Commission is considering defining the relevant geographic market for interstate, interexchange services as "all calls (in the relevant product market) between two points."[24] These new definitions are based upon the U.S. Department of Justice/Federal Trade Commission 1992 Merger Guidelines.[25]

The *NPRM* cites two reasons for the proposed definition changes. First, the Commission claims that there was evidence in the *AT&T Non-Dominance* proceeding that AT&T might possess market power with respect to two specific services—800 directory assistance and analog private line services—and that this evidence "may imply" that these services "might constitute" separate

---

22 *See Craig O. McCaw*, 9 F.C.C.R. 5836, *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

23 *NPRM* at ¶ 41.

24 *Id.* at ¶ 42.

25 1992 U.S. Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569 (1992 Merger Guidelines). A recent article by FCC employee John W. Berresford noted that while some previous decisions of the Commission have referred to the Merger Guidelines, *none* have applied it. Further, the author notes that *no* reported court decisions in merger cases have used the Merger Guidelines exclusively. *See* John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of their Competitive Effects*, 47 Fed. Com. L.J. 247, 255 n.27 (1996). BellSouth submits that, as shown herein, there is no compelling reason to justify using the Merger Guidelines now in lieu of previously adopted definitions.

relevant product markets.[26] Second, the Commission claims the new definitions "will aid in evaluating whether the BOCs possess market power with respect to the provision of interLATA services in the areas where they provide local access service."[27]

BellSouth shows herein that neither of these grounds provides a basis for further restricting the relevant product and geographic market definitions. Accordingly, BellSouth believes the Commission "should retain the relevant product and geographic market definitions adopted in the *Competitive Carrier Proceeding*,"[28] as refined in the *AT&T Non-Dominance Order*.

A. The Existence of Market Power Over Certain Discrete Fringe Services, but not the Interstate, Domestic, Interexchange Market as a Whole, Does Not Warrant Redefinition of the Relevant Product Market

The first justification suggested for revising the relevant market definitions pertains to evidence presented in the *AT&T Non-Dominance* proceeding. There, the record demonstrated that while AT&T's overall market share in the interstate, domestic, interexchange market has fallen to below 60%, AT&T is the sole provider of 800 directory assistance and also retains the ability to raise prices above competitive levels in the analog private line services.[29] Nevertheless, the Commission concluded, barely six months ago, that AT&T's control of these two discrete services "is so small and insignificant relative to the overall interstate, domestic, interexchange market . . . as to be *de minimis*."[30] Thus, the Commission concluded that a carrier will be deemed non-dominant

---

26 *NPRM* at ¶ 40.

27 *Id.* at ¶ 40.

28 *Id.* at ¶ 41.

29 *AT&T Non-Dominance Order*, 1 Com. Reg. (P & F) at 82-83, 92.

30 *Id.* at 92-93.

if it lacks market power in the interstate, domestic, interexchange market as a whole, even if it is able to control the price of some discrete fringe services within the overall market.

The Commission gives no reasoned basis why its recent conclusion now merits revision. In fact, if there was no need to redefine the market for consideration of whether AT&T, the largest IXC, was dominant, there is no need to reconsider the market definition for considering the competitive effects of BOC entry. Moreover, the Commission does not suggest that its reclassification of AT&T as non-dominant needs to be revisited because two discrete fringe services—800 directory assistance and analog private line services—"might constitute separate relevant product markets."[31] In fact, while the Commission seems to justify its proposed relevant product market definition on the basis of service distinctions, it concludes that "defining each interexchange service as a separate relevant product market would result in relevant markets that are too narrow."[32]

However, there may be some fringe services, like 800 directory assistance, that may be separate product markets, depending on the evidence. If, in contrast to typical telecommunications services, consumers cannot switch away from 800 directory assistance, that service may constitute a separate product market. Without specific evidence regarding consumer behavior in this area, the market cannot be defined. This is not the appropriate proceeding in which to conduct an examination of whether separately identifiable product markets exist on the fringe of the telecommunications market.

Indeed, defining each interstate interexchange service as a separate relevant product market would result in relevant markets that are far too narrowly defined. In fact, there is a great deal of cross-elasticity of demand among virtually all interexchange services. Most interexchange services

---

31 *NPRM* at ¶ 40.

32 *Id.* at ¶ 46.

are merely different ways of packaging interexchange transport of information. As such, they are essentially interchangeable at some level, because they all provide a pipeline for transport. Distinctions among services, whether based on price, capacity, or quality, can be erased quickly by resellers, aggregators, or other entrepreneurs who stand ready to act as arbitrageurs. For example, the Commission has long recognized that high-speed, high-capacity circuits can be subdivided into slower or lower-capacity circuits—indeed, that is the foundation on which resale competition has occurred.[33] Similarly, switched toll service and private line service can be used as substitutes for each other.[34] Data services such as ISDN, SMDS, and Frame Relay, while differing in technology, are ultimately substitutable for each other. If the sole supplier of any such service were to raise prices by five percent, most customers would turn to a different technology and a different service category for an alternative means of transporting information—unless entry barriers based on a narrow market definition prevent competitors from responding with alternatives.[35]

Further, as the Commission itself recognized, any delineation of relevant product markets on a service-specific basis would be "administratively burdensome."[36] How could the Commission enunciate reasoned standards for determining which services are in the same product market and which are different, given the likelihood that virtually all interexchange transport services exhibit some degree of cross-elasticity? Any such determinations would have to be made service-by-

---

[33] *See Resale and Shared Use of Common Facilities*, 60 F.C.C.2d 261, 274 & n.28 (1976), *recon.*, 62 F.C.C.2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 213 (1978).

[34] *See MTS and WATS Market Structure*, 81 F.C.C.2d 177, 182 (1980).

[35] Even under the 1992 Merger Guidelines, service-specific product market definitions within interexchange services cannot be sustained. *See* Berresford, 47 Fed. Com. L. J. at 268-71 & n.83; 1992 Merger Guidelines, § 1.11, at 20,572-73.

[36] *NPRM* at ¶ 47.

service, taking into account all services offered by incumbent carriers as well as services offered in the future by incumbent or new carriers. Such determinations would unnecessarily consume vast Commission resources and would ultimately accomplish nothing but a lessening of interservice competition.

Any attempt by the Commission to subdivide the interexchange product market by services or classes of services would misstate the product market and would therefore be highly detrimental to the public interest. At a minimum, this may reduce the competitiveness of each such service. A more pernicious result, however, is that it would facilitate the imposition of "dominant carrier" regulation on, and the establishment or maintenance of entry barriers against, carriers viewed as having some degree of power with respect to particular services within the product market, but without having market power. The 1996 Act was intended to break down the walls among services and service providers and facilitate free and open competition without heavy-handed government regulation. It was not intended to restrain new competitors based on artificial product market definitions.

B. The BOCs' Classification as Dominant in the Local Exchange Market Does Not Confer Dominance in the Provision of In-Region Interexchange Service and Does Not Provide a Basis for Revising the Market Definition for Interexchange Service

The Commission also proposes to revise its definition of the relevant geographic market by applying a point-to-point market definition if there is "credible evidence" suggesting a lack of competition in the market, and if geographic rate averaging will not sufficiently mitigate the exercise of market power.[37] The Commission seems to be concerned that because BOCs control access facilities in their local service areas, they may have market power over in-region interexchange

---

[37] *NPRM* at ¶ 53.

services and therefore may need to be examined individually.[38] To the extent this proposal is an attempt to redefine the current nationwide geographic market on a regional basis in order to pre-ordain that the BOC provision of in-region long distance service will be labeled dominant, it is arbitrary and capricious and contrary to the public interest.[39]

The Commission seems to be proposing a different set of regulatory standards for the current new entrants into the long distance arena—the BOCs—than it applied just last year in facilitating AT&T's provision of interexchange service without dominant-carrier regulation. To do so would be to expressly reject the Commission's previous conclusion with regard to AT&T: "We see no basis for determining whether AT&T is non-dominant *under a different standard than that used for classifying its competitors*."[40] Competing carriers should be subject to the same standards, except where there are compelling reasons for a lack of regulatory parity. The overriding objective of the 1996 Act was to open the door to evenhanded competition among all comers without unnecessary regulatory handicapping, not to stack the deck against new entrants.[41]

The Commission has always considered the geographic market for interexchange competition to be national. The big three IXCs compete on a national basis, and the entire U.S. is clearly the area of effective geographic competition for these firms. As the Commission has noted,

---

38 *See id.*

39 The Commission has observed in a related proceeding that "upon entry into the provision of out-of-region interstate, interexchange services, BOC affiliates would not be likely to possess market power." *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, *Notice of Proposed Rulemaking*, FCC 96-59 at ¶ 8 (Feb. 14, 1996) (*BOC Out-of-Region NPRM*).

40 *AT&T Non-Dominance* Order, 1 Com. Reg. (P & F) at 72 (emphasis added).

41 *See* Conference Report at 1.

the 1996 Act's rate averaging and integration requirements set nationwide price levels, confirming the market based determination that interexchange service is provided in a national market.

Any firm that wishes to enter this national market and sell its services on a regional basis, as some small IXCs already do, is nevertheless competing in a national market. Drawing geographic markets to fit where a firm chooses to sell its services is directly counter to the Merger Guidelines approach to geographic market definition. There is no antitrust precedent that would support this approach to defining geographic markets. The BOCs will seek to provide interexchange service within at least their own regions, and often outside their regions, with the big three IXCs, all of which provide service on a national basis, as well as with other BOCs providing out-of-region service and a variety of smaller competitors. Nearly all interexchange traffic is carried over web-like networks that are not regionally limited. A call between Atlanta and Miami, for example, could be routed via Kansas City or New York as readily as over a direct city-pair trunk. As a result, any attempt by a BOC to raise prices on a particular route or regional group of routes is doomed to failure, because customers can turn to an IXC who will be willing to employ alternative routes at a lower cost.

Starting with zero market share in the interLATA exchange market, the BOC has no ability to raise interexchange service prices in the in-region interLATA exchange market; its entry can only lower prices. In the national interexchange market, market forces force pricing to be set on a national basis. The rate averaging and rate integration requirements also require national pricing. Regional firm pricing is constrained by those national prices and cannot exceed them, regardless of potential differences in the regulatory treatment of regional and national firms. The Commission's observation that rate averaging and rate integration requirements may constrain a regional carrier differently from a national one does not affect the market-driven fact that regional prices cannot exceed national ones in a national market. A regional carrier could charge more than a national

carrier for interstate interexchange services only if it had market power in the national market. Different regulatory impacts from the rate averaging and integration rules cannot create the market power necessary for a regional interexchange carrier to price above national levels.

Moreover, the entry of other BOCs into the provision of interexchange service out of their home regions will place constraints on a BOC's ability to control interexchange prices in-region. Thus, even if the BOC hypothetically sought to raise prices in-region and the principal inter-exchange carriers followed suit, an out-of-region BOC would have the ability and incentive to gain a foothold in the other BOC's region by lowering prices by using alternative routing over facilities elsewhere in the nation that were not subject to the regional price increase.[42]

As incumbent providers of local exchange services, BOCs are regulated as dominant carriers[43] and must provide local exchange access at tariffed rates pursuant to Title II of the Communications Act. However, dominance in the local exchange service market does not constitute a reasoned basis for classifying them as dominant for in-region long distance service. The possibility that a BOC may have power in some assumed local exchange access business that is an input into interstate interexchange service in no way suggests that its entry into the interstate interexchange market would allow it to monopolize that market. It is extremely unlikely that a local input supplier, working from a local base, could ever monopolize a national output market by entering that market. Furthermore, entry into new markets through vertical integration, even by a monopolist, is generally regarded as procompetitive by the antitrust laws, and likely to yield

---

[42] Even under the 1992 Merger Guidelines, the existence of such alternative routing requires use of a nationwide geographic market definition. *See* 1992 Merger Guidelines, § 1.21, at 20,573-74.

[43] BellSouth notes that the incumbent LECs are not the only sources of access. AT&T recently announced that it had signed agreements with more than twenty alternative access providers to connect customers in 95 U.S. cities. "AT&T Challenges RHCs; Companies Ready Entry Plans for Providing New Services," Comm. Daily, Feb. 9, 1996, at 3

substantial consumer benefits. Certainly, BOC entry into the poorly performing interstate interexchange oligopoly market is certain to improve the competitive performance of that market.

Given the applicability of a nondiscriminatory access tariff to all IXCs, no incumbent LEC is provided an opportunity to achieve market power by virtue of the fact that it both provides and purchases access. Moreover, as facilities-based local exchange competition increases as a result of the 1996 Act, IXCs will have the option of obtaining access from non-BOC sources.

Furthermore, even if one assumed that the BOC has the ability to raise the price of access, that does not give the BOC the ability to raise the retail price of interexchange service using that access as an input, as the Commission states.[44] The statutory requirement that IXCs comply with geographic rate averaging and integration contained in Section 254(g) would act as an effective constraint on the effect of geographically-isolated increases in access charges on retail interexchange rates. All that would happen if a BOC raised its access charges in a particular city or group of cities, with other LECs' access charges held constant, is that interexchange calls to and/or from that city or group of cities would become marginally less profitable for both the BOC and other IXCs. It would not give the BOC any competitive advantage over other IXCs for such interexchange transport. In any event, neither BOCs nor other LECs have the unfettered ability to raise access charges, which are subject to extensive regulatory scrutiny, including FCC price caps.

Moreover, a BOC LEC has no ability or incentive to subsidize its own purchase of access for the provision of interexchange service from local exchange revenues, in the post-rate-base-regulation era. All BOC LECs are subject to the Commission's price cap regulations[45] and in many

---

[44] *See NPRM* at ¶ 52.

[45] *See Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *First Report and Order*, 10 F.C.C.R. 8962 (1995); *see also Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 5 F.C.C.R. 6786 (1990), *recon.*, 6 F.C.C.R. 2637 (1991), *aff'd sub nom. National Rural Telecom Assoc. v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

cases their intrastate operations are also subject to price caps These regulations eliminate any ability or incentive to cross-subsidize interLATA service, since the price-capped LEC cannot raise prices on other services to support underpriced interexchange service, either in-region or out-of-region.

The Commission should reject any proposal, such as the revisions to the relevant market definitions under consideration here, which may result in a competitive advantage for one carrier over another. Dominant carrier regulation would adversely affect the BOCs' ability to compete with incumbent interexchange providers and prevent the transformation of the interexchange market into a competitive one, which would deny consumers huge benefits. In addition to compliance costs, dominant carrier regulation creates market inefficiencies, imposes unnecessary costs, and inhibits carriers "from quickly introducing new services and from quickly responding to new offerings by . . . rivals."[46] In addition, dominant carrier tariffs take longer to become effective than non-dominant carrier tariffs.[47] Thus, incumbent interexchange providers (all of which have been declared non-dominant) can "use the regulatory process to delay and . thwart" any competitive advantages sought by BOCs as new entrants.[48] Such a result is inconsistent with the 1996 Act, which "seeks to provide for a procompetitive, de-regulatory national policy framework . . . by opening all telecommunications markets to competition."[49]

---

46 *See AT&T Non-Dominance Order*, 1 Com. Reg. (P & F) at 73.

47 The Commission has also proposed in this proceeding to eliminate the tariff filing requirement for non-dominant carriers. *See NPRM* at ¶¶ 26-38. Comments on this proposal are due separately on April 25, 1996. This proposal only will exacerbate the competitive disadvantage BOCs will experience if they are subjected to dominant carrier regulation in the provision of interexchange service.

48 *AT&T Non-Dominance Order*, 1 Com. Reg. (P&F) at 73.

49 *NPRM* at ¶ 1 (*quoting* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996)).

C. Commission Concerns that LECs Will Exercise Market Power by Providing Poorer or Delayed Access to Rival Interexchange Carriers are Unfounded

The Commission notes that a LEC's ability to raise originating and terminating access charges to monopoly levels is constrained by current price cap regulations, and that this is a reason to treat the relevant geographic market as a national market rather than a serious of point-to-point markets.[50] Nevertheless, it postulates that there are other ways in which LECs providing interexchange service may exert market power without raising access charges for interstate, interexchange services.[51] Specifically, the Commission claims that a LEC could provide poorer access to its interexchange rivals than it provides to itself or its affiliate, thereby raising its rivals' costs, or it could delay rival requests for access to the LEC network.[52] These claims are unfounded.

After a BOC begins to provide interLATA services in-region, there is no reason to believe that it would provide poorer or delayed access to its competitors in favor of its own long-distance service. Such concerns are primarily vestiges of the pre-divestiture era, when AT&T, with over 95% of the interexchange market, used its control of the local exchange to disadvantage its interexchange competitors. Since divestiture, AT&T and other large IXCs have obtained access to the local exchange, and the BOCs will be the newcomers as far as purchasing access is concerned. Moreover, both the Communications Act and the Commission's rules prevent such discrimination by a BOC. Specifically, the Commission has (and will continue to have) access charge rules in place, and the BOCs are obliged to provide equal access to all interexchange carriers. There is no reason to believe

---

50 *See id.* at ¶ 52.

51 *Id.* at ¶ 52 n.120.

52 *Id.*

that the Commission would eliminate these existing obligations for the provision of access as the BOCs enter the interexchange arena.

BellSouth notes that even in the areas where a BOC currently provides interstate/interLATA services today (*i.e.*, in cross-boundary and corridor traffic areas), there has been no difference in the access afforded to competing IXCs. For example, Bell Atlantic has long provided interLATA service in certain "corridors" in the East Coast region pursuant to MFJ waivers without any issue arising concerning discriminatory access. Finally, the access charges paid by IXCs are a major source of revenue for the BOCs. They have no incentive—and indeed have a significant disincentive—to jeopardize this revenue source by providing inferior access, or denying it altogether, especially in light of the emergence into the access provision arena by alternative local exchange carriers and competitive access providers.